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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11	TRIPHINA LESLEY,	)	Case No. CV 15-01696 DDP (DTBx)
		)	
12	Plaintiff,	)	<b>ORDER GRANTING DEFENDANTS'</b>
		)	<b>MOTIONS TO DISMISS</b>
13	v.	)	
		)	[Dkt. Nos. 7, 10]
14	BANK OF AMERICA, N.A., et	)	
	al.,	)	
15		)	
	Defendants.	)	
16		)	
17	_____	)	

Presently before the Court are Defendants' Motions to Dismiss (Dkt. Nos. 7, 10). After considering the parties' submissions, the Court adopts the following order.

**I. BACKGROUND**

Plaintiff Triphina Lesley owns a home in California with a mortgage originally financed by Countrywide Bank, FSB. (Notice of Removal Ex. 1 ("Compl.") ¶ 16.) Countrywide merged into Defendant Bank of America, N.A. ("BANA"), which was identified as Plaintiff's lender on the Corrective Assignment of Deed of Trust in 2014. (See id. Ex. B to Compl.; Def. BANA Mot. Dismiss at 2 & n.1.) BANA transferred the servicing of Plaintiff's loan to Defendant Fay

1 Servicing LLC ("Fay") in 2015. (Def. BANA Mot. Dismiss at 2 &  
2 n.2.)

3 Plaintiff and Defendant BANA's predecessor in interest entered  
4 into a Permanent Loan Modification Agreement on June 29, 2011, but  
5 Plaintiff stopped making payments on the loan in November 2011.  
6 (See Compl. ¶ 20.) Plaintiff alleges that she fully performed  
7 under the Agreement with "four continuous payments" but that the  
8 bank "denied acceptance of payment and continued to proceed forward  
9 with non-judicial foreclosure." (Id.)

10 Notably missing from Plaintiff's complaint is that she filed  
11 for bankruptcy shortly after she stopped making payments;  
12 Defendants allege Plaintiff filed on May 15, 2015. (See Compl.;  
13 Def. BANA Mot. Dismiss at 3; Def. Fay Mot. Dismiss at 4.) Neither  
14 of Plaintiff's Oppositions dispute Plaintiff filed for bankruptcy.  
15 (See Pl. Opp'n to BANA at 7-9; Pl. Opp'n to Fay at 7-9.)

16 Plaintiff alleges that around February 2015, Defendant BANA  
17 recorded a Notice of Default and Election to Sell Under Deed of  
18 Trust. (Compl. ¶ 18.) In May 2015, a Notice of Trustee Sale was  
19 recorded with a date of sale of June 1, 2015. (Compl. ¶ 19.)

20 Plaintiff filed suit against Defendant BANA in California  
21 state court on May 27, 2015. Plaintiff added Defendant Fay on July  
22 24, 2015. Defendant Fay removed the case to this court on August  
23 21, 2015, on the basis of diversity jurisdiction. To date,

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1 Plaintiff has not filed a motion to remand.<sup>1</sup> Defendants have now  
2 filed Motions to Dismiss.

### 3 **II. LEGAL STANDARD**

4 A 12(b)(6) motion to dismiss requires a court to determine the  
5 sufficiency of the plaintiff's complaint and whether or not it  
6 contains a "short and plain statement of the claim showing that the  
7 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under  
8 Rule 12(b)(6), a court must (1) construe the complaint in the light  
9 most favorable to the plaintiff, and (2) accept all well-pleaded  
10 factual allegations as true, as well as all reasonable inferences  
11 to be drawn from them. See Sprewell v. Golden State Warriors, 266  
12 F.3d 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d  
13 1187 (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th  
14 Cir. 1998).

15 In order to survive a 12(b)(6) motion to dismiss, the  
16 complaint must "contain sufficient factual matter, accepted as  
17 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl.  
18 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However,  
19 "[t]hreadbare recitals of the elements of a cause of action,  
20 supported by mere conclusory statements, do not suffice." Id. at  
21 678. Dismissal is proper if the complaint "lacks a cognizable  
22 legal theory or sufficient facts to support a cognizable legal  
23 theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,  
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26 <sup>1</sup> In Plaintiff's Oppositions, she mentions that she filed a  
27 Motion to Remand. (Pl. Opp'n to BANA at 1-3; Pl. Opp'n to Fay at  
28 1-3.) However, no such motion is on the docket. (See also Def.  
Fay Reply at 2 (noting that Plaintiff has not filed a Motion to  
Remand).)

1 1104 (9th Cir. 2008); see also Twombly, 550 U.S. at 561-63  
2 (dismissal for failure to state a claim does not require the  
3 appearance, beyond a doubt, that the plaintiff can prove "no set of  
4 facts" in support of its claim that would entitle it to relief).

5 A complaint does not suffice "if it tenders 'naked  
6 assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556  
7 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has  
8 facial plausibility when the plaintiff pleads factual content that  
9 allows the court to draw the reasonable inference that the  
10 defendant is liable for the misconduct alleged." Id. The Court  
11 need not accept as true "legal conclusions merely because they are  
12 cast in the form of factual allegations." Warren v. Fox Family  
13 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

### 14 **III. DISCUSSION**

#### 15 **A. Judicial Estoppel**

16 Plaintiff alleges seven causes of action, but almost all arise  
17 out of her 2011 loan modification. Defendants argue that Plaintiff  
18 is judicially estopped from making these claims because she failed  
19 to raise them or list them as assets in her bankruptcy proceeding.  
20 (Def. BANA Mot. Dismiss at 5-7; Def. Fay Mot. Dismiss at 3-5.)  
21 Plaintiff argues that she is not judicially estopped from making  
22 these claims because "[t]he bankruptcy petition filed by the  
23 Plaintiff was filed in good faith, as Plaintiff claimed Defendant  
24 as a creditor in each action." (Pl. Opp'n to BANA at 7; Pl. Opp'n  
25 to Fay at 7.)

26 A debtor in bankruptcy is required to declare any pending or  
27 known potential claims as a potential asset on bankruptcy  
28 schedules. See Hay v. First Interstate Bank of Kalispell, N.A.,

1 978 F.2d 555, 557 (9th Cir. 1992). If the debtor fails to do so  
2 and obtains a discharge from the bankruptcy court, then judicial  
3 estoppel will bar future litigation. See Ah Quin v. Cnty. of Kauai  
4 Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013). "The reason  
5 is that the plaintiff-debtor represented in the bankruptcy case  
6 that no claim existed, so he or she is estopped from representing  
7 in the lawsuit that a claim *does* exist." Id. However, judicial  
8 estoppel does not automatically apply, and the Supreme Court has  
9 indicated that judicial estoppel is not appropriate where "a  
10 party's prior position was based on inadvertence or mistake." New  
11 Hampshire v. Maine, 532 U.S. 742, 753 (2001).

12 In Ah Quin, the Ninth Circuit explained that this exception to  
13 judicial estoppel is not necessarily so "narrow" such that a court  
14 only looks to whether the debtor knew of the claim and had a motive  
15 to conceal the claim, such as "keeping any potential proceeds from  
16 creditors." Ah Quin, 733 F.3d at 271-72. Instead, a narrow  
17 understanding of "inadvertence or mistake" is appropriate "[w]hen a  
18 plaintiff-debtor has *not* reopened bankruptcy proceedings" and filed  
19 amended bankruptcy schedules listing the claim as an asset. Id. at  
20 272-73. In that situation, judicial estoppel is plainly fair to  
21 apply "given the strong need for full disclosure in bankruptcy  
22 proceedings and the fact that the plaintiff-debtor received an  
23 unfair advantage in the bankruptcy court." Id. (citing Hamilton v.  
24 State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001)). If the  
25 plaintiff-debtor does reopen and amend bankruptcy proceedings, then  
26 "rather than applying a *presumption* of deceit, judicial estoppel  
27 requires an inquiry into whether the plaintiff's bankruptcy filing  
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1 was, in fact, inadvertent or mistaken, as those terms are commonly  
2 understood." Id. at 273.

3 Here, Plaintiff alleges that her bankruptcy was filed in good  
4 faith with Defendant claimed as a creditor. However, the filing of  
5 a bankruptcy petition in good faith does not prevent the  
6 application of judicial estoppel. In her 2012 bankruptcy,  
7 Plaintiff failed to disclose the claims that arose out of her 2011  
8 loan modification agreement, those claims being known to her at the  
9 time. Plaintiff did not and has not reopened her bankruptcy  
10 proceedings and amended the schedules to include these claims.  
11 Plaintiff received the benefit of her prior statement in bankruptcy  
12 court that no such claims existed by having her bankruptcy  
13 discharged. Plaintiff has offered no facts to demonstrate why this  
14 failure to disclose was inadvertent or a mistake, or why she did  
15 not reopen bankruptcy proceedings. Therefore, Plaintiff's claims  
16 here that arose before her bankruptcy discharge are barred by  
17 judicial estoppel. This includes her breach of contract, breach of  
18 covenant of good faith and fair dealing, promissory estoppel, and  
19 anticipatory relief causes of action, as well as the declaratory  
20 relief and unfair business practice claims in so far as they rely  
21 on these contract-related claims.

22 **B. Homeowner Bill of Rights Claims**

23 Plaintiff also alleges claims under California's Homeowner  
24 Bill of Rights ("HBOR"). Plaintiff alleges that Defendants  
25 violated section 2923.6, which forbids lenders from pursuing  
26 foreclosure while considering a loan modification ("dual  
27 tracking"), and section 2923.7, which requires lenders to provide a  
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1 single point of contact to a borrower who requested a foreclosure  
2 prevention alternative. See Cal. Civ. Code §§ 2923.6, 2923.7.

3 Defendants argue variously that the HBOR claims are preempted  
4 by the federal Home Owner's Loan Act ("HOLA"), that HOLA applies to  
5 successors in interest to federal savings banks, that BANA did  
6 modify Plaintiff's loan once and she defaulted on that  
7 modification, and that there was a team as Plaintiff's single point  
8 of contact. (See Def. BANA Mot. Dismiss at 15-16; Def. Fay Mot.  
9 Dismiss at 11-16.)

10 Plaintiff argues that she did not plead any default of a first  
11 loan modification agreement – quite the contrary, in fact, as she  
12 alleges Defendant(s) violated the agreement – and that Defendants  
13 did not provide a single point of contact. (Pl. Opp'n to BANA at  
14 13-15; Pl. Opp'n to Fay at 15-17.) In her Complaint, Plaintiff  
15 states in her fourth cause of action that she was shuffled from one  
16 representative to another at BANA regarding her loan modification  
17 and in her fifth cause of action, Plaintiff states, "Despite  
18 Plaintiff's request for assistance with an alternative to  
19 foreclosure prevention, Plaintiff was not provided with the name or  
20 information of their 'Case manager' after January 1, 2013 and to  
21 this date." (Compl. ¶¶ 57, 65.)

22 Under section 2923.6(c)(3), if a borrower defaults under a  
23 first loan modification, then the lender can proceed with  
24 foreclosure. Cal. Civ. Code § 2923.6(c)(3). The single point of  
25 contact requirement only applies when a borrower requests a  
26 foreclosure prevention alternative and the contact remains "until  
27 the mortgage servicer determines that all loss mitigation options  
28 offered by, or through, the mortgage servicer have been exhausted

1 or the borrower's account becomes current." Cal. Civ. Code §  
2 2923.7(a), (c).

3 Here, it is unclear what modification – if any – Plaintiff  
4 sought after the 2011 modification agreement. The Complaint does  
5 not refer to a second request for a loan modification after the  
6 2011 agreement and 2012 bankruptcy. Plaintiff has also not pled  
7 that she made any payments on the loan after November 2011 or after  
8 her 2012 bankruptcy. Therefore, the Court cannot find a reason to  
9 allow these HBOR claims to go forward as presently pled because  
10 there does not appear to be grounds for disallowing foreclosure  
11 under section 2923.6 or for a foreclosure alternative request in  
12 2013 that would require a single point of contact under section  
13 2923.7. The declaratory relief and unfair business practices  
14 causes of action are also dismissed on this ground in so far as  
15 they rely upon these causes of action. Because the Court finds the  
16 pleading facially insufficient, the Court declines to examine the  
17 preemption question presented by the Defendants.

18 **IV. CONCLUSION**

19 For all the reasons stated above, the Court GRANTS Defendants'  
20 Motions to Dismiss without prejudice. Because this is Plaintiff's  
21 first complaint, the Court GRANTS Plaintiff leave to amend the  
22 complaint if there are facts that support these causes of action.  
23 A First Amended Complaint shall be filed within fourteen days of  
24 the date of this order. Failure to do so may result in the  
25 dismissal of this case.

26 IT IS SO ORDERED.

27 Dated: October 5, 2015

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DEAN D. PREGERSON  
United States District Judge